

12 CV 03331

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**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

United States District Court		District
Name (under which you were convicted): Mohamed Rashed Daoud Al-'Owhali		Docket or Case No.: 98-01023
Place of Confinement: USP FLORENCE ADMAX	Prisoner No.: 42371-054	
UNITED STATES OF AMERICA		Movant (include name under which you were convicted) v. Mohamed Rashed Daoud Al-'Owhali

**MOTION**

- (a) Name and location of court that entered the judgment of conviction you are challenging: United States District Court, Southern District of New York.
- (b) Criminal docket or case number (if you know): 98-01023
- (a) Date of the judgment of conviction (if you know): 10/23/2001
- (b) Date of sentencing: 10/18/2001
- Length of sentence: Life
- Nature of crime (all counts): Conspiracy to kill US Citizen; Maiming within the special maritime or territorial jurisdiction; killing a citizen outside the US; possess w/intent/use in crime (federal facility); murder, first degree; explosives used in commission of felony; violent crime/drugs/machine gun.
- (a) What was your plea? (Check one)
 

(1) Not guilty ☒ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?
- If you went to trial, what kind of trial did you have? (Check one) Jury ☒ Judge only ☐

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U.S. DISTRICT COURT  
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7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐
9. If you did appeal, answer the following:
- (a) Name of court: U.S. Court of Appeals, Second Circuit
- (b) Docket or case number (if you know): \_\_\_\_\_
- (c) Result: Conviction affirmed
- (d) Date of result (if you know): 11/24/2008
- (e) Citation to the case (if you know): 552 F3d 93, 552 F3d 177
- (f) Grounds raised: 1. Sufficiency of the indictment. 2. Denial of motion to suppress statements made in Kenya.
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☒ No ☐
- If "Yes," answer the following:
- (1) Docket or case number (if you know): \_\_\_\_\_
- (2) Result: Cert denied
- \_\_\_\_\_
- (3) Date of result (if you know): 6/8/2009
- (4) Citation to the case (if you know): 129 S.Ct. 2778
- (5) Grounds raised: Same as appeal
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?
- Yes ☒ No ☐
11. If your answer to Question 10 was "Yes," give the following information:
- (a) (1) Name of court: U.S. Court of Appeals, Second Circuit
- (2) Docket or case number (if you know): 01-1535 cr / 05-0920 cr
- (3) Date of filing (if you know): 4/14/2009

(4) Nature of the proceeding: Motion to remand

(5) Grounds raised: Newly discovered evidence

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☒ No ☐

(7) Result: Motion for remand granted for limited purpose

(8) Date of result (if you know): 4/30/2009

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: United States District Court, SDNY

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): 9/8/2009

(4) Nature of the proceeding: Motion to open suppression hearing in full.

(5) Grounds raised: After my conviction, the government disclosed information that cast doubt on the admissibility of incriminating statements which were the subject of my appeal, aff'd 11/24/2008, reported at 552 F3d 177.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☒ No ☐

(7) Result: Motion denied

(8) Date of result (if you know): 2/9/2010

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☒

(2) Second petition: Yes ☒ No ☐ Ordered aff'd on 1/26/2011.

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. GROUNDS FIVE THRU ELEVEN ATTACHED.

**GROUND ONE:** Failure of US authorities to make all reasonable efforts to use 20th century technology to provide me with atty before & during interrogation violated my 5th & 6th Amendment rights.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):  
The US authorities never utilized the telephone and/or internet facilities at their disposal to provide me with an attorney before or during my interrogation.  
Even if the attorney could not be physically present with me before or during my interrogation, I should have been allowed to contact an attorney by phone or internet.  
I was also denied the right to contact my consular representative by phone or internet.  
Modern means of communications could have been easily employed, with appropriate safeguards, to protect my right to consult with an attorney after my arrest, and my right to consult with my consular representative.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**(b) Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel.

\_\_\_\_\_

\_\_\_\_\_

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

\_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.

**GROUND TWO:** In violation of 5th Amendment, the "AOR" I signed in Kenya did not give me the right to remain silent.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The Advisement of Rights ("AOR") form that I signed in Kenya stated that I did not have to speak to the US ~~DOBA~~ authorities. The AOR form did NOT state that I had the right to remain silent, in violation of my 5th Amendment rights.

Although The American and the Kenyan laws give me the right to remain silent and although there were nothing To prevent The FBI To tell me That "you have The right To remain silent They chose To give The impression That my refusal To talk To them dose not mean that I have The right not to talk to The kenyans.

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**(b) Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective  
assistance of counsel.

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**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

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Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

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Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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We are representatives of the United States Government.  
Under our laws, you have certain rights. ~~Before we ask you any~~  
questions, we want to be sure that you understand those rights.

You do not have to speak to us or answer any questions.  
Even if you have already spoken to the ~~KENYAN~~ authorities,  
you do not have to speak to us now.

If you do speak with us, anything that you say may be used  
against you in a court in the United States or elsewhere.

In the United States, you would have the right to talk to a  
lawyer to get advice before we ask you any questions and you  
could have a lawyer with you during questioning. In the United  
States, if you could not afford a lawyer, one would be appointed  
for you, if you wish, before any questioning.

Because we are not in the United States, we cannot ensure  
that you will have a lawyer appointed for you before any  
questioning.

If you decide to speak with us now, without a lawyer  
present, you will still have the right to stop answering  
questions at any time.

You should also understand that if you decide not to speak  
with us, that fact cannot be used as evidence against you in a  
court in the United States.

I have read this statement of my rights and I understand  
what my rights are. I am willing to make a statement and answer  
questions. I do not want a lawyer at this time. I understand  
and know what I am doing. No promises or threats have been made  
to me and no pressure or coercion of any kind has been used  
against me.

Signed [Signature]

Witness: [Signature]

Witness: [Signature]

Time: 10:55 AM / 3:30 PM

ENGLISH

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ADD 8/12/98  
Special Agent  
FBI NY

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.

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**GROUND THREE:** My trial in the SDNY violated my 6th Amendment right to a trial in the place where the supposed offense was committed.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):  
In my case, the supposed offense took place in Nairobi, Kenya. At no time  
has anyone suggested that the supposed offense was committed in the SDNY.

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**(b) Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel.

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**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

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Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_



Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.

**GROUND FOUR:** My trial in the SDNY violated 18 USC 3238 because my trial did not take place in the district to which I was first brought.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

After the conclusion of my interrogation in Kenya, I was flown to the US. Various US officials were present on the flight: AUSA Pat Fitzgerald, interpreter Mike Fegali, FBI agents and possibly others. The first time we landed in the US, Mr. Fegali told me that we were NOT in New York City. Mr. Fegali told me that the purpose of the landing was to allow certain FBI agents to get off the plane and go home. Later, the plane landed in New York City.

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**(b) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective  
assistance of counsel.

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**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

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Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

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Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.

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13. Is there any ground in this motion that you have not previously presented in some federal court?

If so, which ground or grounds have not been presented, and state your reasons for not presenting them: Due to ineffective assistance of counsel,

none of the grounds presented in this motion have  
been presented to a federal court.

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. \_\_\_\_\_

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15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Leonard Joy, New York

David Bruck, New York

(b) At arraignment and plea: Leonard Joy, New York

David Bruck, New York

(c) At trial: Frederick H. Cohn, New York; David Baugh, Virginia;  
Laura Gasiorowski, New York

(d) At sentencing: Frederick H. Cohn, New York; David Baugh,  
Virginia

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(e) On appeal: Frederick H. Cohn, New York

(f) In any post-conviction proceeding: Frederick H. Cohn, New York

(g) On appeal from any ruling against you in a post-conviction proceeding: \_\_\_\_\_

Frederick H. Cohn, New York

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: \_\_\_\_\_

(b) Give the date the other sentence was imposed: \_\_\_\_\_

(c) Give the length of the other sentence: \_\_\_\_\_

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion. \* This petition is timely. The Second Circuit affirmed the trial court's denial of my motion to reopen the suppression hearing in full on 1/26/2011, 407 Fed. Appx. 548; 2011 U.S. App. LEXIS 1626.

Pursuant to the Supreme Court's decision in Clay v. United States, 123 S.Ct. 1072 (2003), the 1-year statute of limitation period started to run when the time for seeking Supreme Court review of the Second Circuit's 1/26/2011 decision expired on 4/25/2011.

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\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

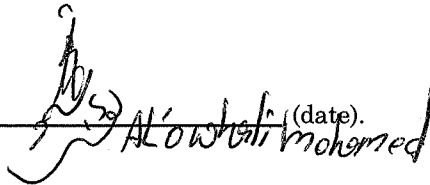
Therefore, movant asks that the Court grant the following relief: Reversal of my conviction; new trial with full constitutional rights of the accused safeguarded.

or any other relief to which movant may be entitled.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on 4-19-2012 \_\_\_\_\_ (month, date, year).

Executed (signed) on \_\_\_\_\_ (date).

  
Alowhat Mohamed

\_\_\_\_\_  
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IN FORMA PAUPERIS DECLARATION

\_\_\_\_\_  
[Insert appropriate court]

\* \* \* \* \*

Ground Five :  
My Counsel Failure To bring defense expert in Foreign  
Language To challenge govt interpreter during Examination  
 (a) Supporting Facts of witnesses was ineffective assistance of counsel  
The absence of defense experts in Foreign Language  
To insure The neutrality of The government interpreter  
and The properly of The Translation during The direct  
and cross examination of witnesses deprived me of  
My right To Confront The witnesses

(b) Direct Appeal of Ground Five :

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: InEFFECTive

assistance of counsel

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer is "Yes," did you raise this issue on appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

ineFFECTive assistance of counsel

**Ground Six** \_\_\_\_\_:

My attorneys' failure to object to government's use of DOJ/FBI interpreters, instead of neutral court interpreters, violated my Sixth

(a) Supporting Facts Amendment right to effective assistance of counsel.

Although I pointed out the injustice of the use of FBI interpreters to my defense team, an objection was never made on the record. A fair trial is not possible if neutral, court-affiliated interpreters are not available. Late in the trial, AUSA Fitzgerald "wondered" if court interpreters might be available. See transcript pg. 4759, lines 21-25, pg. 4760, line 1. My counsel should have insisted that court interpreters be made available whenever the jury heard witnesses' testimony, rather than acquiescing in the govt's use of FBI interpreters.

**(b) Direct Appeal of Ground Six** \_\_\_\_\_:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel.

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer is "Yes," did you raise this issue on appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.



20 interpretation, your Honor.

21 THE COURT: I will see counsel and the reporter.

22 (Continued on next page)

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1 (Page 4758 sealed)

2 (In open court)

3 THE COURT: Ladies and gentlemen, we are having some  
4 problem with translation, and I think rather than waste your  
5 time while we try and straighten it out -- I see heads nodding  
6 in agreement -- we will call it a day. We are adjourned until  
7 tomorrow.

8 (Jury excused)

9 THE COURT: The witness may step down.

10 (Witness excused)

11 THE COURT: Will we have another interpreter  
12 tomorrow, since there seems to be some suggestion that this  
13 interpreter is not interpreting fully?

14 MR. FITZGERALD: Your Honor, just for the record, I  
15 know the witness does speak English, so I don't know that he  
16 missed the word Somali. Putting that aside, I suggest that we  
17 use a court interpreter. That is the one we have been using.  
18 I don't know that we have one available. I don't want to show  
19 up in court tomorrow without an interpreter. I don't want  
20 there to be any question about the capabilities of the  
21 interpreter. When we knew Mr. Kherchtou was being called  
22 today, we assumed defense counsel didn't have one available  
23 and we brought Ms. Laraby in. We do not have someone on  
24 standby that is not affiliated with the FBI. So I wonder if  
25 there is a court interpreter that could be produced to be

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1 available.

2 MR. WILFORD: Would it be possible to use one of the  
3 interpreters in the booths?

**Ground Seven:**

My Sixth Amendment right to confront the witnesses against me was violated by failure to include an audio recording as part of the official trial record.

**(a) Supporting Facts**

An audio recording of the trial would have allowed me to challenge the errors and/or mis-statements of the FBI interpreters who are the subject matter of Ground Six. During the cross-exam of govt witness Kerchtou, mis-interpretation by FBI interpreter assisted the prosecution in establishing a fictional conspiracy with regard to events in Somalia. See transcript pg 4752, ln 1, thru 4759, ln 21. The Court noted interpreters did NOT take notes, they worked from memory. See pg 4760, lns 14-16. An audio recording would've permitted me to show that the interpreter did not correctly translate questions by Mr. Schmidt, pg 4759, lns 11-16, pg 4760, lns 12-18.

**(b) Direct Appeal of Ground Seven:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel.

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer is "Yes," did you raise this issue on appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.

4752

1 CROSS-EXAMINATION

2 BY MR. SCHMIDT:

3 Q Good afternoon, Mr. Kherchtou.

4 A Good afternoon.

5 Q The first time that you went to Nairobi -- withdrawn.

6 Prior to being in Nairobi, were you in Afghanistan or  
7 in the Sudan? Withdrawn. I will try again.

8 What country did you leave before you entered Kenya?

9 MR. FITZGERALD: Just a time frame, your Honor.

10 Object.

11 Q What country did you leave when you first entered Kenya?

12 A I went from Pakistan through Dubai directly to Nairobi.

13 Q The people that you were with before you went to Nairobi  
14 for the first time were people who were in Pakistan; is that  
15 correct?

16 A Correct.

17 Q You came into Nairobi sometime in October of 1993; is that  
18 correct?

19 A Yes.

20 Q You stayed there for a short period of time, then you went  
21 to the Sudan; is that right?

22 A Yes.

23 Q That was because your family was going from Pakistan to  
24 Sudan at the time that you were coming to Nairobi; is that  
25 right?

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1 A Yes.

2 Q You went to Sudan after your family arrived from Pakistan;  
3 is that correct?

4 MR. FITZGERALD: Objection, your Honor. This was  
5 covered the last time in detail.

6 THE COURT: Suppose you move on.

7 MR. SCHMIDT: Your Honor, a lot of things have been  
8 covered the last time and I am just --

9 THE COURT: Go ahead.

10 MR. SCHMIDT: Thank you.

11 Q Is that correct?

12 A My family went from Pakistan to Saudi Arabia and from  
13 Saudi Arabia to Sudan.

14 Q You were in Nairobi for a short period of time, then you  
15 went to the Sudan and came back into Nairobi; is that correct?

16 A Yes, correct.

17 Q Could you give us an estimate of the period of time --  
18 withdrawn.

19 How long did you stay in Sudan before you returned to  
20 Nairobi?

21 A Less than a month.

22 Q And then after you came back to Kenya and stayed in  
23 Nairobi -- withdrawn.

24 You know who Abu Ubaidah al Banshiri is; is that  
25 correct?

4754

1 A Yes.

2 Q Did you see him in Nairobi when you came to Nairobi the  
3 first time?

4 A I don't believe I saw him the first time I was there.

5 Q Did you see him in the Sudan when you went to the Sudan  
6 after being in Nairobi a short period of time?

7 A I do not remember.

8 Q Did you see him in Nairobi shortly after returning to  
9 Nairobi, within the next few weeks?

10 A It could possibly be so. I do not precisely remember.

11 Q You heard through one of the people in Al Qaeda that al  
12 Banshiri was with others training Somalis in Hergeiza; isn't  
13 that correct?

14 A Yes.

15 Q Hergeiza, do you know that Hergeiza is in north Somalia?

16 A Yes.

17 Q Who told you that?

18 A One of the people in the guesthouse.

19 Q Did one of those people tell you that he came down from  
20 that area of Somalia?

21 A I do not precisely remember, but they told me that when  
22 they were there, they were there in the north.

23 Q When you say they told me, do you remember the particular  
24 person or persons that told you that?  
25 A Truthfully, I do not remember.

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1 Q Do you remember where you were when they told you that?  
2 A I could have been in the guesthouse or someplace belonging  
3 to the Al Qaeda.  
4 Q Your testimony is, you have a vague memory of this being  
5 told you; is that correct?  
6 A They told me that they were in the north and they were  
7 training people there, and then after that they withdrew from  
8 there.  
9 Q You didn't write anything down, did you, sir?  
10 A Yes.  
11 Q So what I am saying is that you really don't have much of  
12 a memory of how that conversation took place except for what  
13 you told us here today; is that right?  
14 A Yes.  
15 Q You also heard that this training took place after the  
16 incident in Somalia; isn't that right?  
17 MR. FITZGERALD: Objection to form.  
18 THE COURT: Sustained. What incident?  
19 MR. SCHMIDT: Your Honor, I am going to ask him that  
20 question and then I will ask him what the incident was.  
21 THE COURT: The question is unintelligible.  
22 MR. SCHMIDT: I don't think it is unintelligible --  
23 THE COURT: Please don't argue. Restate your  
24 question.  
25 Q Did this training that you heard take place after any

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1 particular incident that sticks in your mind?  
2 A I do not remember what was this incident.  
3 Q Do you remember telling agents of the United States  
4 government that you heard about this training in the north of  
5 Somalia after the Somalia incident happened?  
6 A You mean after the fall-down of Somalia? You mean the

7 government of Said Berri?

8 Q Mr. Kherchtou, did you tell an agent of the FBI on August  
9 16, 2000, that Al Qaeda people were in Hergeiza, Somalia, with  
10 Abu Ubaidah al Banshiri, and were training Somali people  
11 there, especially after the Somalia incident happened?

12 A Yes.

13 Q And by the incident, you are talking about the attack on  
14 the Abdi House, aren't you?

15 MR. WILFORD: Objection, your Honor.

16 THE COURT: Overruled.

17 A I have never heard about the incident of the Abdi House.

18 (Continued on next page)

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4757

1 Q Did you hear of the incident of the United States  
2 troops --

3 MR. FITZGERALD: Objection, your Honor.

4 THE COURT: Yes, sustained.

5 Q Do you recall the description of what the incident was  
6 that you told the agents?

7 A What incident are you talking about? What incident?

8 Q Mr. Kherchtou, did you tell an agent of the FBI on August  
9 16, 2000, that Abu Ubaidah al Banshiri, with others, trained  
10 the Somali people, especially after the Somalia incident  
11 happened? Period.

12 MR. FITZGERALD: Objection, asked and answered.

13 THE COURT: Yes, sustained. Answered.

14 MR. SCHMIDT: He didn't --

15 THE COURT: Don't argue, please. Ask another  
16 question.

17 MR. SCHMIDT: Your Honor, may we approach at sidebar?

18 THE COURT: No, let's proceed.

19 MR. SCHMIDT: It's a problem with translation and

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20 interpretation, your Honor.

21 THE COURT: I will see counsel and the reporter.

22 (Continued on next page)

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1 (Page 4758 sealed)

2 (In open court)

3 THE COURT: Ladies and gentlemen, we are having some  
4 problem with translation, and I think rather than waste your  
5 time while we try and straighten it out -- I see heads nodding  
6 in agreement -- we will call it a day. We are adjourned until  
7 tomorrow.

8 (Jury excused)

9 THE COURT: The witness may step down.

10 (Witness excused)

11 THE COURT: Will we have another interpreter  
12 tomorrow, since there seems to be some suggestion that this  
13 interpreter is not interpreting fully?

14 MR. FITZGERALD: Your Honor, just for the record, I  
15 know the witness does speak English, so I don't know that he  
16 missed the word Somali. Putting that aside, I suggest that we  
17 use a court interpreter. That is the one we have been using.  
18 I don't know that we have one available. I don't want to show  
19 up in court tomorrow without an interpreter. I don't want  
20 there to be any question about the capabilities of the  
21 interpreter. When we knew Mr. Kherchtou was being called  
22 today, we assumed defense counsel didn't have one available  
23 and we brought Ms. Laraby in. We do not have someone on  
24 standby that is not affiliated with the FBI. So I wonder if  
25 there is a court interpreter that could be produced to be

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1 available.

2 MR. WILFORD: Would it be possible to use one of the  
3 interpreters in the booths?

4 THE COURT: That is what I am wondering.

5 Tomorrow, can you be the interpreter for this  
6 witness?

7 MR. MAGED: Yes, I can, your Honor. May I request  
8 from your Honor that the questions be broken down into one or  
9 two sentences for accuracy sake.

10 THE COURT: That is a very reasonable request. The  
11 questions are very long and the witness gives a very long  
12 answer, and we notice that the interpreters do not take notes,  
13 they do it from memory, and I commend to everyone the use of  
14 short questions.

15 I am told that the reason for the repetitiousness of  
16 the question was because there was a report that the adjective  
17 of Somalia in Somalia incident was not fully translated and  
18 that was why the question was being repeated.

19 We have a few moments. There are some moments.

20 MR. SCHMIDT: Yes, your Honor. I have a application  
21 for a mistrial on behalf of Mr. El Hage and a severance, for a  
22 number of reasons.

23 First, your Honor, your Honor cautioned one of the  
24 death penalty counsel in the initial phase of the trial, after  
25 either the cross-examination of Mr. Fadl or Mr. Kherchtou,

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1 about requesting witnesses not related to the guilt phase but  
2 related to the penalty phase. The questioning by Mr. Baugh  
3 was not geared --

4 THE COURT: The questioning of which witness?

5 MR. SCHMIDT: Mr. Kherchtou today was not related to  
6 the guilt phase.

7 THE COURT: Which questions?

8 MR. SCHMIDT: I do not have it in front of me, but  
9 the questions related solely to who gets chosen to do the  
10 death jobs, almost entirely what is in the embassy, making  
11 surveillance. These are not questions for fact defense.  
12 These are questions related to the penalty phase. I made some  
13 objections and they were all overruled. What has happened is  
14 that Mr. Baugh has used this witness as a penalty-phase  
15 witness, severely prejudicing Mr. El Hage --

16 THE COURT: I allowed the line of questioning, which



**Ground Eight** :

My counsel's failure to request an audio recording at my suppression hearing was ineffective assistance of counsel because I have no way to challenge the qualification

**(a) Supporting Facts** testimony of interpreter Mike Figali.

There is no audio record of interpreter Figali's demonstration of his supposed proficiency in the Arabic language. As a result, I had no way to challenge his supposed expertise based on his actual testimony. My counsel relied solely on the decision of my expert ~~Professor Said~~ <sup>B.K.A.</sup> Said's decision not to challenge Figali's proficiency in Arabic. An audio recording was absolutely necessary in order to protect my right to challenge Figali's supposed expertise in Arabic. It was impossible to do that given that there is nothing I can challenge on the record.

**(b) Direct Appeal of Ground Eight** :

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel.

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer is "Yes," did you raise this issue on appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.

**Ground Nine :**

Ineffective assistance of counsel in signing stipulation, Govt EX. 34, in violation of my Sixth Amendment rights.

**(a) Supporting Facts**

My counsel signed Government's Exh 34, see also Docket Document 774-9 in violation of my right to effective assistance of counsel. Because of the confidential nature of the translator's assignment to my interrogation in Kenya on August 12-14, 1998, she would have testified behind a curtain at trial. This would have been of minimal concern to effective counsel because the interpreter ~~made contradictory statements that had to be tested~~ *M.R.A.* on cross-examination.

**(b) Direct Appeal of Ground Nine :**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel.

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer is "Yes," did you raise this issue on appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.

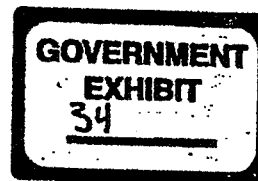
Case 1:98-cr-01023-KTD

Document 774-9

Filed 08/14/2009

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA :

- v - :

USAMA BIN LADEN, et al., :

Defendants. :

----- X

STIPULATION

S(7) 98 Cr. 1023 (LBS)

IT IS HEREBY STIPULATED AND AGREED by and between the United States of America, by Mary Jo White, United States Attorney for the Southern District of New York, Kenneth M. Karas, of counsel, and defendant Mohamed Rashed Daoud al-'Owhali, by and with the consent of his attorney, Frederick H. Cohn Esq., that if called as a witness, the "Translator" would testify as follows:

1. Translator is a native Arabic speaker who grew up in a Middle Eastern country.
2. Translator attended high school in the Middle East, becoming familiar with multiple dialects of Arabic because she attended school with persons speaking Arabic from various Middle Eastern countries.
3. Translator later moved to the United States where she learned English in the process of attending college here. She has been speaking English for approximately 20 years and is fluent in English.
4. On August 12, 1998, Translator was in Nairobi, Kenya working as a Translator (from Arabic to English and vice versa) and was advised by her supervisor that the FBI had requested a translator on an emergency basis and she was told to help the FBI.

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5. Translator attended meetings with the defendant al-'Owhali, FBI agents and Kenyan CID personnel on August 12, August 13 and August 14, 1998, translating what the parties said to each other.

6. Translator and al-'Owhali spoke classical Arabic to each other and they had no difficulty understanding each other.

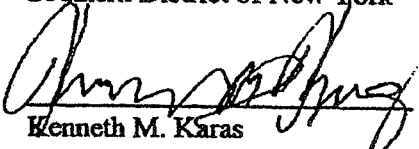
7. Specifically, Translator translated the Advice of Rights Form, previously marked as Government Exhibit 2, from English to Arabic as an FBI agent read the form to al-'Owhali in English. Whenever asked, al-'Owhali indicated that he understood what was being said to him.

8. ~~Translator never threatened al-'Owhali.~~ (Knd)


Dated: New York, New York  
January 24, 2001

MARY JO WHITE  
United States Attorney  
Southern District of New York

By:

  
Kenneth M. Karas  
Assistant United States Attorney

By:

  
Frederick H. Cohn  
Attorney for Defendant  
Mohamed Rashed Daoud al-'Owhali.

**Ground Ten**:

My Sixth Amendment right to a speedy trial before an impartial jury of my peers was violated by excessive delay and a jury pool drawn exclusively from registered voters.

**(a) Supporting Facts**

First, I was arrested in August, 1998. My trial did not begin until January, 2001. Second, a jury comprised exclusively of registered voters could never be impartial because it heard evidence that bin Laden held those who voted for the US govt responsible for the death of innocents in Muslim countries. In closing, AUSA Karas reminded the jury of the fact that bin Laden, in his ABC interview, said the voting public was responsible because they chose the government by voting for it. See transcript, page 5334, lines 1-6 and 10-13. After hearing the evidence and closing, the jury could not deliberate impartially since it was comprised 100%

**(b) Direct Appeal of Ground Ten**: of registered voters.

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel.

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer is "Yes," did you raise this issue on appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.

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1 marked as 80-T, you will see that Bin Laden is asked the  
2 question about his declaration of jihad, and he gives a very  
3 succinct answer. He says, we declared jihad against the US  
4 government because the US government is unjust, criminal and  
5 tyrannical. It has committed acts that are extremely unjust,  
6 hideous and criminal, whether directly or through its support  
7 of the Israeli occupation of Palestine. So he is adding an  
8 additional reason for the war against America. About two  
9 thirds of the way down that same answer Bin Laden says, as for  
10 what you asked, whether jihad is directed against US soldiers,  
11 the civilians in the land of the two holy places, Saudi  
12 Arabia, or against the civilians in America, we have focused  
13 in our declaration on striking at the soldiers in the country  
14 of the two holy places. The country of the two holy places  
15 has in our religion a peculiarity of its own over other Muslim  
16 countries. In our religion it is not permissible for any  
17 nonMuslim to stay in our country. Therefore, even though  
18 American civilians are not targeted in our plan, they must  
19 leave. We do not guarantee their safety because we are in a  
20 society of more than a billion Muslims. A reaction might take  
21 place as a result of US government's hitting Muslim civilians,  
22 a warning that you will see Bin Laden play out later on. At  
23 the last part of that answer, Bin Laden says so, the US is  
24 responsible for any reaction, because it has transgressed  
25 through war from military personnel to civilians. This is

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1 what we say. As for what you asked regarding the American  
2 people, they are not exonerated from responsibility because  
3 they chose this government and voted for it despite their  
4 knowledge of its crimes in Palestine, Lebanon, Iraq and in  
5 other places, and its support of its collaborating regime who  
6 filled our prisons with our best children and scholars. We  
7 ask that God may release them.

8 Ladies and gentlemen, Bin Laden is sending a message.  
9 Yes, the main focus of our jihad is the American soldiers in

30

**Ground Eleven.**

Failure of my counsel to bring defense fingerprint expert to challenge govt fingerprint positive ID of my print was ineffective assistance of counsel in violation of 6th Amend.

**(a) Supporting Facts**

The govt's fingerprint expert, Mitchell L. Hollars, testified that the latent print on EX K405.1 was a positive match with the right thumb print on my identification card. See pg 2455, lns 12-23. My defense counsel did not consult with a fingerprint expert before trial in spite of the fact that to the naked eye, the prints did not match. Failure of my counsel to challenge the evidence at trial allowed the govt to argue that I was present at the location where the bomb was assembled.

**(b) Direct Appeal of Ground Eleven**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Ineffective assistance of counsel.

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer is "Yes," did you raise this issue on appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) is "No," explain why you did not appeal or raise this issue: Ineffective assistance of counsel.



20 Moving to the left across four ridges we have a ridge  
21 that ends which is marked as point number 4. From point  
22 number 4 moving downward we have a short ridge, one end of  
23 which is marked as point number 5. The other end which is  
24 marked as point number 6. Moving to the left across one ridge  
25 we have another ridge that ends which is marked as point

2455

1 number 7.  
2 Going to the latent fingerprint we should find the  
3 same characteristics. So moving across the four ridges from  
4 point number 3 we find point number 4, which is a ridge that  
5 ends in an upward direction. Following point number 4  
6 downward we find a short ridge, one end of which is marked as  
7 point number 5, the second which is marked as point number 6.  
8 Moving from the short ridge to the left across one  
9 ridge we have a ridge that ends which is marked as point  
10 number 7. Using this method of comparison points that I  
11 illustrated as well as others that are not marked in these two  
12 photographs that I determined that the latent print that was  
13 developed on K405.1, and the right thumb impression that  
14 appeared on the fingerprint card bearing the name of  
15 al-'Owhali were made by one and the same individual.

16 Q Now, the indication up to 13 represents that you found 13  
17 identical points of comparison?

18 A No. I marked 13. There is additional ones that are  
19 present.

20 Q And typically how many points of identification in common  
21 do you require before you determine that the fingerprints are  
22 identical?

23 A Seven.

24 Q Now, I'd like to show you what has been marked for  
25 identification as Government Exhibit 696-LP. Is that an

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1 enlargement of a comparison between the inked fingerprint  
2 identified as Mr. Odeh and a latent fingerprint that was  
3 marked as Q788.5?